

2007

Bonneville Billing and Collections v. Shari D. Harper : Brief of Appellee

Utah Court of Appeals

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G. Scott Jensen; Farr, Kaufman, Hamilton, Sullivan, Jensen, Medsker, Olds and Nichols.

Shari D. Harper; Defendant/Appellant.

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IN THE COURT OF APPEALS FOR THE STATE OF UTAH

BONNEVILLE BILLING &
COLLECTIONS,

Plaintiff/Appellee,

vs.

SHARI D. HARPER,

Defendant/Appellant.

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Case No. 20070343-CA

BRIEF OF APPELLEE

A response to the appeal filed in this matter from the decision of the Second Judicial
District Court, Weber County, Judge Brent W. West

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Case No. 20070343-CA

JURISDICTION

The Court of Appeals has jurisdiction over this appeal from a final order pursuant to § 78-2a-3(2)(h) of the Utah Code 1953 as amended.

ISSUES PRESENTED FOR APPEAL

1. Whether the Second Judicial District Court lacked jurisdiction over the Defendant/Appellant.

2. Whether Judge West's decision in favor of the Plaintiff/Appellee, Bonneville Billing & Collections, was proper.

STANDARD OF REVIEW

The trial court's Findings of Fact are reviewed under a clearly erroneous standard. Taylor v. Hansen, 958 P.2d 923, 929 (Utah at App. 1998)

STATEMENT OF THE CASE

The Defendant was served personally with a ten day Summons and Complaint on May 27, 2006.

The Plaintiff filed the Complaint on June 6, 2006.

Defendant filed an Answer on June 16, 2006 pro se, listing her name, address and telephone number on the top left corner of the Answer. The address listed by the Defendant is the same now as at the time she filed her Answer: 384 South 7400 East, Huntsville, Utah 84317. R.1

On July 31, 2006, the Plaintiff filed a Request for Pre-Trial and sent notice to the Defendant. The pre-trial conference was scheduled for September 6, 2006 at 4:00 p.m. R.3 The pre-trial conference was held on September 6, 2006 at 4:00 p.m. at the Second District Court in Weber County. Judge Brent W. West presiding. R.11

Attorney G. Scott Jensen appeared in person and the Defendant appeared by phone. No negotiation was reached between the parties and the matter was set for further pre-trial on October 4, 2006, and the court granted the Defendant's request that she be allowed to appear by phone. R.11

On October 4, 2006, G. Scott Jensen, attorney, appeared on behalf of the Plaintiff; the Defendant appeared telephonically, representing herself pro se. At pre-trial, since no negotiations had been reached, the matter was set for bench trial on December 1, 2006 at 1:30 p.m. R.12

On December 1, 2006, at the time set for trial, the Plaintiff was represented by G. Scott Jensen, attorney at law. The Defendant did not appear. The court noted that the Defendant previously contacted the court and requested a continuance, which was denied unless the parties were to agree. The court found that there was no agreement with Mr. Jensen and that Mr. Jensen had not received any contact from the Defendant requesting a continuance.

The court allowed a bench trial to commence in absentia.

Plaintiff's witness, Gary Nielsen, was sworn in and testified. The court then heard argument from counsel, G. Scott Jensen. The court made its decision for the record. R.33-36

The court ordered a Judgment entered against the Defendant and in favor of the Plaintiff in the amount of \$1,936.03. Defendant was further ordered to pay the attorney's fee to the Plaintiff in the amount of \$325.00.

Counsel for the Plaintiff, Mr. G. Scott Jensen, was ordered to prepare the necessary paperwork for the court's signature. On December 18, 2006, the court received the Judgment and Order prepared by Plaintiff's attorney. R.16-18

The Judgment and Order was signed by Judge Brent West on January 4, 2007. R.16-18

The Judgment and Order were entered on January 9, 2007 indicating a total Judgment of \$2,249.15. On January 12, 2007, a Notice of Judgment was filed by Plaintiff. On January 29, 2007, the Defendant filed a Motion of Objection and Motion for Directed Verdict and/or Amendment of Verdict. R.21-28 On January 30, 2007, the Plaintiff filed an Objection to the Motion to Set Aside the Judgment. R.29-31 On February 28, 2007, the Plaintiff filed a Request to Submit for Decision. R.32 On April 10, 2007, the Order denying the Defendant's Motion to Set Aside Judgment was signed. On April 12, 2007, the denying Defendant's Motion to Set Aside the Judgment was filed.

On April 23, 2007, the Defendant filed her Notice of Appeal. R.48

SUMMARY OF ARGUMENT

A trial was held in absentia. The Plaintiff provided testimony regarding the contract entered into between the Defendant and Gold's Gym.

The Defendant failed to appear at the time of trial. The Defendant never raised an objection to the issue of jurisdiction until her appeal and Plaintiff will argue that jurisdiction is proper and that the Defendant's objection to jurisdiction is untimely.

ARGUMENT

POINT I - THE TRIAL COURT'S ORDER IS SUPPORTED BY THE EVIDENCE.

At trial, the court heard evidence presented by the Plaintiff in the form of testimony from Gary Nielsen, an employee of Gold's Gym. Mr. Nielsen testified that Shari Harper had failed to comply with her contractual agreement to make monthly payments to maintain her membership. The contract, which was signed by the Defendant, was submitted into evidence. Evidence was also submitted regarding the Defendant's failure to comply with her payment agreement.

The court ordered a Judgment for the unpaid balance of the contractual agreement.

POINT II - THE TRIAL COURT HAD JURISDICTION OVER THE DEFENDANT.

Harper raises the issue of jurisdiction for the first time on appeal. The Defendant was, at the time the contract was entered into, a resident of Weber County. The Defendant did not change her residence and continued to accept notice of hearings at her residence in Weber County. The contract was entered into in Weber County and all matters relating the litigation in this matter have been addressed in Weber County. The Defendant appeared two times telephonically and filed her Answer in Weber County. Defendant did not raise any valid objection to jurisdiction in her Answer or in either of the two pre-trials. It is well settled law that generally "issues not raised at trial cannot be argued for the first time on appeal. " Monson v. Carver, 928 P.2d 1017, 1022 (Utah 1996)

The Defendant argues that Plaintiff's Complaint "has no cognizable right of recovery, and therefore confers no responsibility or authority upon the court to hear the case." Rule 3(b) of the Utah Rules of Civil Procedure states that "the court shall have jurisdiction from the time of filing of the Complaint or service of the Summons and a copy of the Complaint." Rule 3(b) clearly states that the trial court has jurisdiction over the matter beginning with the time that the Complaint was

filed and the service of the Summons and copy of Complaint on the Defendant. The Defendant, Shari D. Harper, was served personally with a 10 Day Summons on May 27, 2006. The Complaint was filed on June 6, 2006.

In the case at hand, the trial court had in-personam jurisdiction over the Defendant, because the Defendant resided in Weber County at the time she entered into the contract and has continued to reside in Weber County through trial to the present time. In-personam jurisdiction is the power which a court has over the Defendant herself in contrast to the court's power over the Defendant's interest in property or power over the property itself. A court which lacks personal jurisdiction is without power to issue an in-personam judgment. Pennoyer v. Neff, 95 US 714, 24 L.Eb. 565.

The Defendant has never raised the defense of lack of jurisdiction over the subject matter or lack of jurisdiction over her person pursuant to Rule 12(b) of the Utah Rules of Civil Procedure. Interestingly, the only admission that the Defendant made in her Answer was to jurisdiction. In the Defendant's response to the Plaintiff's Complaint at paragraph number 3 wherein the Plaintiff's Complaint stated "3. Jurisdiction in Weber County is proper because the Defendant resides in Weber County, State of Utah." The Defendant's Answer is as follows: "The Defendant will admit paragraph 3." It is worth noting that jurisdiction was the only admission that the Defendant made in her Answer. Furthermore, the Defendant has never raised the issue of jurisdiction prior to her appeal.

POINT III - THE APPELLANT/DEFENDANT WAS NOT EXCUSED FROM HER DUTY TO ATTEND TRIAL.

The Appellant argues in her brief that she did not appear for trial because she did not have a duty to attend because the trial court lacked jurisdiction. However, Ms. Harper has not set forth

a basis for her objection to jurisdiction. Ms. Harper lives within Weber County, and the contract was entered into by Ms. Harper in Weber County.

Ms. Harper argues that Judge West should have realized that he did not have jurisdiction and therefore he should have immediately dismissed the Complaint. However, she does not set forth a reason for her theory that the trial court lacked jurisdiction.

In light of the fact that personal and subject matter jurisdiction were proper and in light of the Defendant's duty to raise those issues prior to appeal the Defendant's argument is without merit.

POINT IV - THE DEFENDANT IS NOT RELIEVED FROM HER DUTY TO MARSHAL THE EVIDENCE BECAUSE THE TRIAL COURT DID ISSUE FINDINGS OF FACT.

The trial court did issue Findings of Fact setting forth the basis for the ruling in its Decision signed March 22, 2007.

The court found:

- (a) "The Defendant has never made a personal court appearance in this case."
- (b) "All of Defendant's appearances have been made by either filing paperwork or telephonically."
- (c) "The Defendant, as a courtesy to her health problems, was allowed to appear, by telephone, at her two pre-trial conferences. Those conferences were held September 6, 2006 and October 4, 2006."
- (d) "At the September 6, 2006 pre-trial conference, trial in this matter, was set for December 1, 2006. The trial was set with the Defendant's approval."
- (e) "The December 1, 2006 trial setting was reconfirmed at the October 4, 2006 pre-trial

conference.”

(f) “On the day of trial, the Defendant requested a continuance. The court denied the Motion for a Continuance, but did indicate that the Defendant could call the Plaintiff’s attorney and see whether or not the Plaintiff would agree to a continuance.”

(g) “Apparently, the Defendant did not call Plaintiff’s counsel.”

(h) “The trial was held, testimony was taken, and a judgment was entered against the Defendant.”

(i) During the pre-trial conferences, where the court and the parties limited the issues to be tried, the only viable defense raised by the Defendant was that she had entered into an agreement with Gold’s Gym to suspend her requirement to make monthly payments under her contract.”

(j) “The Defendant has never provided proof of the suspension agreement.”

(k) “This was the only issue to be tried. Now that the trial is over, the Defendant raises other issues that were never raised during the pre-trial. In particular, the issues raised, by the Defendant, concerning the alleged deficiencies in Plaintiff’s Complaint should have been raised earlier in the proceedings. They are untimely.”

(l) “Taking testimony was entirely appropriate. It was especially appropriate and necessary to address the Defendant’s allegation that the parties had entered into a suspension agreement.”

(m) “Gary Nielsen was the official record keeper for Gold’s Gym and testified, pursuant to the Utah Rules of Evidence, concerning the parties’ contract.”

(n) “Although timely filed, the Defendant’s Motion sets out no basis to either set aside the Plaintiff’s judgment or grant the Defendant a new trial.”

(o) “Specifically, no new evidence has been presented justifying a new trial and no

meritorious defense has been established sufficient to set aside the judgment.”

(p) “In fact, the Defendant was given ample time to establish her defense during discovery.”

As set forth above, the trial court issued ample Findings of Fact regarding the history of this matter, the trial, and the basis for the court’s decision. The Defendant’s argument that she is relieved from her duty to marshal the evidence because the trial court did not issue Findings of Fact is baseless.

POINT V - APPELLANT FAILED TO MARSHAL THE EVIDENCE.

The trial court entered Findings in support of the Judgment, as set forth above.

On appeal, Harper argues that the judge did not comply with his duty under the Utah Rules of Civil Procedure and did not include Findings of Fact. The Defendant argues that she could not fulfil her obligation to marshal the evidence “if it existed”, due to the fact that the court did not issue Findings of Fact. However, the court did issue Findings of Fact which the Defendant had a duty to marshal. “An Appellant must marshal the evidence in support of the Findings and then demonstrate that despite this evidence, the trial court’s findings are so lacking in support as to be against a clear weight of the evidence.” In Re: Estate of Bartell, 776 P.2d 885, 886 (Utah 1989)

The Appellant has a duty to provide evidence to the Court “in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the Appellant resists.” Chen v. Stewart, 2004 UT 82 100 P.3d 1177. The Appellant has the duty to explain why the trial court’s findings are against a clear weight of evidence. The Appellant’s failure to marshal the evidence should result in this court assuming that the trial court’s findings are correct and affirming the lower court’s decision.

POINT VI - PLAINTIFF SHOULD BE AWARDED ATTORNEY’S FEES.

“Generally, when the trial court awards fees in a domestic action to the party who then substantially prevails on appeal, fees will be awarded to the party on appeal.” Lyngle v. Lyngle, 831 P.2d 1027, 1031 (Utah at App. 1992) Plaintiff in this case was awarded attorney’s fees at the time of trial. Although Ms. Harper indicated in the docketing statement that she was appealing this ruling, the attorney’s fees were not challenged in her brief and therefore were not waived. Therefore, the Plaintiff should be awarded the attorney’s fees awarded at the trial level and attorney’s fees for the defense of this frivolous appeal as well. The cost of responding to the Defendant’s appeal far exceeds the original Judgment amount.

CONCLUSION

The trial court’s ruling is supported by the findings on the record. The Appellant does not have a basis for challenging the court’s in-personam and in-rem jurisdiction.

The Appellant’s failure to appear at trial were not excused by the court, and were certainly not excused by the court’s alleged lack of jurisdiction. Therefore, the District Court’s Judgment should be affirmed and Plaintiff should be awarded attorney’s fees and costs on appeal.

DATED this 27 day of December, 2007.

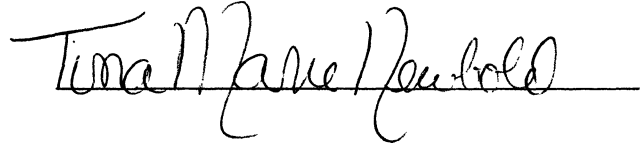


G. SCOTT JENSEN
Attorney for Appellee

CERTIFICATE OF SERVICE

I do hereby certify that I caused to be served two correct copies of the foregoing Brief of Appellee via first-class mail, postage prepaid this 27th day of December, 2007, to:

Shari D. Harper
384 South 7400 East
Huntsville, UT 84317

A handwritten signature in cursive script, reading "Tina Marie Hubbard", is written over a horizontal line.